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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Blue Cross and Blue Shield of New Jersey, Inc., et alia,

Plaintiffs,

- against -

Philip Morris, Inc., et alia,

Defendants.

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CV-98-3287 (JBW)

MEMORANDUM AND ORDER

SIFTON, Chief Judge

Plaintiffs, independent Blue Cross and Blue Shield insurance plans, commenced this action against defendants, major tobacco manufacturers and related organizations, pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"), and the Clayton and Sherman Antitrust Acts, 15 U.S.C. §§ 1 and 15, seeking to recover economic damages they say they have incurred in the medical treatment of diseases caused by tobacco use. Pursuant to Rule 50.3 of the Rules for the Division of Business Among Judges for the Eastern District of New York (the "Guidelines"), plaintiffs designated this action as related to another lawsuit already pending before Judge Weinstein, *National Asbestos Workers Medical Fund v. Philip Morris Inc.*, No. 98 Civ. 1492 (JBW), and the Clerk of the Court accordingly assigned this action to Judge Weinstein as a related case. Defendants now move to have this case reassigned to another judge in this District under the Random Selection Procedure described

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in Rule 50.2(b) and (c) of the Guidelines. Defendants contend that such a reassignment is necessary to protect their due process rights and to preserve the appearance of justice. They argue that plaintiffs, by manipulating the federal venue and the relatedness rules of this Court, have impermissibly "judge-shopped" or pre-selected Judge Weinstein to preside over proceedings in this lawsuit.

For the reasons stated below, the defendants' motion is denied.

BACKGROUND

This suit is one of three nationwide lawsuits commenced by Blue Cross and Blue Shield health insurance organizations for the recovery of economic damages they already incurred in the medical treatment of diseases caused by tobacco use. Plaintiffs are health insurance organizations incorporated in nineteen different states and the District of Columbia, many of which do business as "Blue Cross and Blue Shield" insurance plans ("BC/BS Insurers"). On April 29, 1998, plaintiffs filed their complaint, asserting claims under RICO, 18 U.S.C. § 1962, and the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1 and 15, as well as pendent state law claims under various state statutes and under common law theories of fraudulent misrepresentation, fraudulent concealment, breach of a special or assumed duty, unjust enrichment, and conspiracy. Plaintiffs allege that venue is proper in this District under 28 U.S.C. § 1391(b) because, at all material times, defendants resided and did business in this

District. Plaintiffs also allege that venue is proper in this District under the federal antitrust and racketeering laws, 15 U.S.C. § 22; 18 U.S.C. § 1956, because at all material times defendants were "found" or "transact[ed]" business within this District.

On April 29, 1998, other BC/BS Insurers doing business in other states filed actions against many of the same defendants in federal district courts in the Northern District of Illinois, *Arkansas Blue Cross & Blue Shield v. Philip Morris Inc.*, No. CV-98-2612 (filed Apr. 29, 1998), and the Western District of Washington, *Regence Blue Shield v. Philip Morris Inc.*, No. CV-98-559 (filed Apr. 29, 1998). The litigation filed in the Northern District of Illinois asserts claims pursuant to RICO, 18 U.S.C. § 1962, the Sherman Act, 15 U.S.C. § 1, as well as various pendent state law claims under statutory and common law. In the litigation filed in the Western District of Washington, the plaintiffs indicated that their action was related to another action pending in that court, *Northwest Laborers Employers Health & Security Trust v. Philip Morris Inc.*, No. CV-97-849 (filed May 21, 1997), by union health and welfare funds asserting tort and statutory claims against tobacco defendants. In the litigation filed in the Northern District of Illinois, the plaintiffs did not designate their case as related to prior actions by union health funds against tobacco defendants pending in that court. Plaintiffs in this action explain that the Chicago plaintiffs failed to do so because they were unaware of those prior actions,

which were filed originally in state court and contemporaneously removed by defendants to federal court.

As already noted, when plaintiffs filed the complaint in this action, they designated the action on the civil docket cover sheet as related to another lawsuit pending before Judge Weinstein, *National Asbestos Workers Medical Fund v. Philip Morris Inc.*, No. CV-98-1492 (filed Mar. 23, 1998). A case is "related" to another case for the purposes of the division of business among the judges of this District "when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Guidelines, Rule 50.3(a). If a party filing a case believes that it is related to a prior case, the Guidelines require the party to so indicate on the civil docket cover sheet. The Guidelines further provide that each attorney in a case has an ongoing duty to advise the Clerk upon learning of any facts indicating that his or her case may be related to any other pending case. Moreover, in addition to this duty imposed by the Guidelines, Local Civil Rule 1.6 imposes an ongoing duty on each attorney appearing in a case to bring promptly to the attention of the Clerk all facts that he or she believes are relevant to a determination that the case and one or more pending cases should be heard by the same judge in order to avoid unnecessary duplication of judicial effort. If an

attorney fails to comply with Local Civil Rule 1.6, the Court may impose sanctions.

In *National Asbestos*, the plaintiffs, self-insured, multi-employer health and welfare trust funds that provide health care benefits to union workers in the building trades, seek to recover economic damages they have incurred for the medical treatment of diseases caused by tobacco use. The plaintiffs in *National Asbestos* assert claims against the defendants, major tobacco manufacturers and related entities, for violations of RICO, 18 U.S.C. § 1962, as well as federal common law claims for unjust enrichment, indemnity, and breach of an assumed duty. Many of the defendants in *National Asbestos* are also named as defendants in this action. When filing their complaint, the plaintiffs in *National Asbestos* did not designate that case as related to any other cases pending in this Court and, accordingly, that case was assigned randomly to Judge Weinstein.[1/] On April 20, 1998, the defendants in *National Asbestos* moved to transfer venue to the District of Maryland. On July 2, 1998, Judge Weinstein denied that motion as not sufficiently ripe for decision and granted leave to renew the motion to change venue after further developments in that case.

[1/] Contrary to defendants' assertions, the civil docket cover sheet filed in *National Asbestos* indicates that the plaintiffs in that case did not designate *National Asbestos* as related to any other cases pending before Judge Weinstein. The docket, however, indicates that *National Asbestos* was subsequently referred to Magistrate Judge Gold for pretrial supervision as related to three other cases pending before Judge Weinstein and Magistrate Judge Gold: *Falise v. American Tobacco Co.*, CV-97-7640 (filed Dec. 31, 1997); *H.K. Porter v. RAP Industries*, CV-97-7658 (filed Dec. 31, 1997); and *Laborers Industries v. American Tobacco Co.*, CV-98-675 (filed Jan. 30, 1998).

Because plaintiffs designated the present action as related to *National Asbestos*, the Clerk of the Court assigned this action to Judge Weinstein, as required by Rule 50.3(e) of the Guidelines. If a case is erroneously assigned as related, the Guidelines provide that such a designation may be corrected *sua sponte* by the judge to whom the case was assigned by returning the erroneously assigned case to the Clerk for reassignment. *See* Guidelines, Rule 50.3(f). Judge Weinstein has not returned this action to the Clerk for reassignment.

Defendants now move to have this action reassigned by the undersigned under the Random Selection Procedure described in Rules 50.2(b) and (c) of the Guidelines, arguing that plaintiffs have impermissibly "judge-shopped." They contend that plaintiffs have manipulated the federal venue rules and the Court's relatedness rules to pre-select Judge Weinstein by commencing this action in this District when none of the named parties in this case maintain their principal place of business in this District and by improperly designating this action as related to *National Asbestos*. Defendants argue that the inference that plaintiffs have "judge-shopped" is "overwhelming" because of the absence of any meaningful nexus between this litigation and this District and because of what they characterize as Judge Weinstein's well-publicized views in the areas of mass tort litigation and products liability. They contend that plaintiffs' strategic use of the Court's relatedness rules is further evidence by the decision of the other BC/BS Insurer plaintiffs in

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the Northern District of Illinois litigation not to designate their case as related to a prior action pending in that forum.

DISCUSSION

At the outset, I note that defendants have not moved to disqualify Judge Weinstein pursuant to either of the federal recusal statutes set forth in 28 U.S.C. §§ 144 and 455. Instead, they have moved to reassign this case pursuant to the Random Selection Procedure set forth in Rules 50.2(b) and (c) of the Guidelines. Accordingly, the standard to be applied to this motion to reassign is whether such a reassignment is "in the interest of justice and the efficient disposition of the business of the court." Guidelines, Rule 50.4. The Guidelines, as their introduction explicitly states, do not vest "any rights in the litigants or their attorneys" and instead were adopted solely "for the internal management of the case load" of this District. *See Peacock Holdings, Inc. v. Massachusetts Mut. Life Ins. Co.*, No. 94 Civ. 5023, 1996 WL 285435, at *10 (E.D.N.Y. May 23, 1996). Moreover, motions for reassignment or recusal "are not encouraged because they place a burden on other judges in the court and disrupt the smooth administration of justice under the Guidelines." *United States v. Escobar*, 803 F. Supp. 611, 613 (E.D.N.Y. 1992) (Weinstein, J.).

Defendants argue that reassignment of this action is "in the interests of justice" because it is necessary to protect their fundamental right to due process under the Fifth Amendment to the United States Constitution. In support of this argument,

defendants cite the Supreme Court's observation in *Aetna Life Insurance Co. v. Lavoie*, 457 U.S. 813 (1986), that "[t]he Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Id.* at 825 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). They contend that plaintiffs' exploitation of the federal venue rules and the Court's relatedness rules to pre-select Judge Weinstein has threatened the appearance of impartiality in this action, as well as their due process rights.

It is well established that there is a constitutional right to have "a neutral and detached judge" preside over judicial proceedings. *See Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The Supreme Court, however, has recognized that "most matters involving judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948); *see also Aetna*, 475 U.S. at 820 ("The Court has recognized that not '[a]ll questions of judicial qualification ... involve constitutional validity.'"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) ("All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship,

personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.").

Generally, the Supreme Court has found disqualification constitutionally required only where the judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against [a party] in [the] case." *Tumey*, 510 U.S. at 523; *see also Murchison*, 349 U.S. at 136 ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); *Cement Instit.*, 333 U.S. at 702 (distinguishing *Tumey* on this ground). Such an interest in the outcome exists where the "situation is one 'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance, nice, clear and true.'" *Aetna*, 475 U.S. at 822 (quoting *Ward*, 409 U.S. at 60). For instance, in *Aetna*, the Court held that the participation of an Alabama Supreme Court justice in an action against an insurance company alleging bad-faith failure to pay claims and seeking punitive damages violated the appellant-insurer's due process rights where the issues involved in the action also were present in a personal lawsuit by the justice against another insurance company and where the action's outcome had the clear and immediate effect of enhancing both the legal status and the settlement value of the justice's lawsuit. *See id.* at 821-25; *see also Murchison*, 349 U.S. at 136 (criminal defendants' due process rights were violated where the same judge served as "one-man grand jury" and then tried and convicted defendants for events that occurred during grand jury

proceedings); *Tumey*, 273 U.S. at 532 (criminal defendant's due process rights were violated where he was convicted, fined, and committed to jail by a judge who was paid only when he convicted the defendant). If the case presents mere allegations of bias and prejudice by the judge rather than a "direct, personal, substantial, pecuniary" interest in the outcome, "only in the most extreme of cases would disqualification on [that] basis be constitutionally required." *Aetna*, 475 U.S. at 821; *see also Martuzas v. Reynolds*, 983 F. Supp. 87, 91 (N.D.N.Y. 1997) (no due process violation where mere allegation of prejudice and no direct, personal, substantial, pecuniary interest alleged).

Here, defendants do not allege that Judge Weinstein has a direct, personal, substantial, or pecuniary interest in this action, nor do they explicitly allege any bias or prejudice by Judge Weinstein. Accordingly, reassignment of this action is not necessary to protect defendants' due process rights. This conclusion is reinforced by defendants' failure to file a recusal motion pursuant to 8 U.S.C. §§ 144 or 455. The Second Circuit has recognized that, while the due process right to a fair trial is independent from the rights conferred by §§ 144 and 455 and "may well force recusal in instances where those statutes are not technically applicable," the federal recusal statutes were enacted to protect this constitutional right to a fair trial. *In re IBM Corp.*, 618 F.2d 923, 932 n.11 (2d Cir. 1980). Accordingly, "anything impinging on the constitutional right 'would have more readily violated § 144 and § 455.'" *Id.*

(quoting *United States* v. *Haldeman*, 559 F.2d 31, 130 n.276 (D.C. Cir. 1976)).

Defendants also have failed to show that reassignment of this action is in the interests of justice. Defendants' reliance on the Supreme Court's observation in *Aetna* that "'justice must satisfy the appearance of justice,'" 475 U.S. at 825, is misplaced. This observation was made in the context of the Court's holdings in *Aetna* and *Murchison* that disqualification is constitutionally required only where the judge has a direct, personal, substantial, pecuniary interest the outcome of the case. *See Aetna*, 475 U.S. at 825; *Murchison*, 349 U.S. at 136; *see also Offutt* v. *United States*, 348 U.S. 11, 14 (1954) (in sitting in judgment on a misbehaving lawyer, the judge "should not himself give vent to personal spleen or respond to a personal grievance"). Here, there is no allegation that Judge Weinstein has such an interest in the outcome of this action.

Moreover, as Judge Mukasey has aptly observed, a concern for appearances does not require a concern for mirages. *United States* v. *El-Gabrowny*, 844 F. Supp. 955, 961 (S.D.N.Y. 1994) (Mukasey, J.); *see also In re 1983 Lorraine St. Assocs. French Bourekas, Inc.* v. *Turner*, No. CV-95-4514, 1996 WL 148333, at *3 (E.D.N.Y. Mar. 15, 1995) (Glasser, J.) ("Either the federal judiciary is shamefully insensitive to circumstances from which their impartiality might reasonably be questioned, or the Bar is afflicted with a chronic case of myopia and sees mirages."). Disqualification is not required "every time one party can make

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some argument no matter how unreasonable, that the appearance of prejudice would result." *Lamborn v. Dittmer*, 726 F. Supp. 510, 516 (S.D.N.Y. 1989); *see also In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1307 (2d Cir. 1988) ("[W]e cannot adopt a per se rule holding that when someone claims to see smoke, we must find that there is fire. That which is seen is sometimes merely a smokescreen."). If that were the case, "[j]udge shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal." *Drexel*, 861 F.2d at 1307. Disqualification for impartiality or bias thus must have a reasonable basis. *See, e.g.*, H.R. Rep. No. 93-1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (discussing § 455); *Drexel*, 861 F.2d at 1313; *see also Public Utils. Comm'n v. Pollack*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., recusing himself in a separate opinion) ("The guiding consideration is that the administration of justice should *reasonably appear* to be disinterested as well as to be so in fact." (emphasis added)).

The inference that plaintiffs have "judge-shopped" in this case is neither overwhelming nor inescapable. On the contrary, as discussed in greater detail below, plaintiffs properly designated this action as related to *National Asbestos* due to the similarity of facts and legal issues between the two cases. If defendants believe that plaintiffs' choice of venue in this District is legally improper, they may move for a change of venue. While defendants accuse plaintiffs of "judge-shopping," defendants themselves might as easily be accused of such conduct

in the filing of the instant motion. "Recusal motions should not be allowed to be used as 'strategic devices to judge shop.'" *El-Gabrowny*, 844 F. Supp. at 958-59 (quoting *Lamborn*, 726 F. Supp. at 515). As Congress has cautioned, a "'judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision.'" *Lamborn*, 726 F. Supp. at 516 (quoting S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973)); *see also Drexel*, 861 F.2d at 1312. "A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *Drexel*, 861 F.2d at 1312.

Defendants' argument that plaintiffs have "judge-shopped" rests upon their assumption that Judge Weinstein is biased against them because of his "well known" views on products liability and mass tort litigation. Thus, they state that "[t]he inference that plaintiffs have judge-shopped becomes overwhelming when one considers not only the absence of any nexus between plaintiffs and the Eastern District of New York, but also the fact that Judge Weinstein's views in the area of products liability and mass tort litigation are well known." (Defs.' Mem. at 3.) In support of this assertion, defendants cite Judge Weinstein's decisions in the *"Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), and the *DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992), as well as his scholarly publications.

It is well settled, however, that adverse judicial rulings on legal or factual matters in the case at issue or prior proceedings or a judge's views on particular legal issues will not support an inference of bias or prejudice against a party sufficient to require the judge's disqualification. *See, e.g., Wilkerson v. McCarthy*, 336 U.S. 54,65 (1949) (Frankfurter, J., concurring); *Ex Parte Am. Steel Barrel Co.*, 230 U.S. 35, 44 (1913); *Drexel*, 861 F.2d at 1314; *IBM Corp.*, 618 F.2d at 929; *United States v. Haldeman*, 559 F.2d 31, 133 n.130 (1976). Judge Weinstein's conduct in other cases and his views of the law provide no basis for the reassignment of this action.[2/]

Moreover, defendants have failed to show that reassignment of this action will make for in the efficient disposition of the business of the Court. The Guidelines provide that cases are related when, "because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate." Guidelines, Rule 50.3(a). Here, plaintiffs properly designated this action as related to *National Asbestos* since both cases share similar facts and legal issues and arise from the same events. Both cases assert claims under

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[2/] I note that this is not the first occasion where a party has objected to Judge Weinstein's participation in a case on the basis of his conduct in other mass tort cases. *See In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1438 (2d Cir. 1993). Extolling Judge Weinstein's "innovations" and innovative managerial skills" in such large-scale litigation, the Second Circuit rejected those objections and aptly remarked that such allegations of prejudice are "an affront to both the district court and this court." *Id.* at 1439.

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the federal RICO statute, alleging that, since 1953, the defendants have conducted and conspired to conduct a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) and (d), including acts of mail and wire fraud (18 U.S.C. §§ 1341, 1343), threatening and intimidating witnesses (18 U.S.C. §§ 1512, 1513), and interstate and foreign travel in aid of racketeering (18 U.S.C. § 1952). In each case, the plaintiffs allege that the defendants have conducted a decades-long scheme to maximize the sales of tobacco products, mislead the American public and regulators as to the health hazards and addictive properties of nicotine and the tobacco manufacturers' manipulation of nicotine levels, and shift the costs of health care for smoking-related injuries to others, including the plaintiffs in both cases. The RICO claims in each case arise from many of the same transactions, including an industry strategy meeting on December 15, 1953, at the Plaza Hotel in New York where many of the defendant tobacco manufacturers conspired to conduct a campaign of misinformation to deceive the American public about the health consequences and addictive properties of tobacco use, the creation and funding of allegedly fraudulent "front" organizations such as the Council for Tobacco Research, and the allegedly fraudulent testimony by defendants' chief executive officers before Congress in 1994 denying the addictive properties of nicotine. Both actions also assert that the defendants have invested and conspired to invest their racketeering proceeds in the acquisition, establishment, and operation of enterprises

engaged in interstate commerce in violation of 18 U.S.C. § 1962(a) and (d), as well as pendent common law claims for unjust enrichment and breach of an assumed duty. Given the complexity of the factual records and the legal claims asserted in each case and the necessity of conserving resources in this extremely busy Court, it is clear that reassignment would not contribute to the efficient disposition of business in this Court.

Accordingly, for the reasons stated above, defendants' motion to reassign is denied.

The Clerk is directed to furnish a filed copy of the within to all parties and to Judge Weinstein and Magistrate Judge Gold.

SO ORDERED.

Dated : Brooklyn, New York
May 4, 1999

United States District Judge